IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1724

SUPERIOR COURT OF NEW HAMPSHIRE,
ROCKINGHAM COUNTY,
Petitioner,

V.

WALTER C. ROYAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

WALTER C. ROYAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The Rockingham County, New Hampshire, Superior Court appeals from the Judgment of the United States Court of Appeals for the First Circuit, entered on March 12, 1976, vacating an Order of the United States District Court for the District of New Hampshire, which denied Walter C. Royal a writ of habeas corpus, and submits this statement to show that the Supreme Court

of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The Opinion of the First Circuit is not yet reported. A copy of the Opinion is appended as Appendix A. The Opinion of the District Court is reported at 397 F. Supp. 260 (D.N.H. 1975). A copy of the Opinion is appended as Exhibit B. The Opinion of the New Hampshire Supreme Court which affirmed Respondent Royal's conviction in the Rockingham County Superior Court is reported as State vs. Royal at 113 N.H. 224, 305 A.2d 676 (1973). A copy of the Opinion is appended as Appendix C.

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was filed on March 12, 1976, and this petition was filed within ninety (90) days of that date. Jurisdiction of this cause is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

I. WHETHER A FEDERAL COURT, IN EXAMINING A NEW HAMPSHIRE CRIMINAL STATUTE TO DETERMINE WHETHER IT IS VOID FOR VAGUENESS, AND, THEREFORE, VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, MUST CONSIDER THE STATUTE AS CONSTRUED BY THE NEW HAMPSHIRE SUPREME COURT IN THE COURSE OF PRIOR LITIGATION.

STATEMENT OF THE CASE

On October 8, 1970, Respondent Walter C. Royal was arrested by the Portsmouth, New Hampshire Police and charged with mutilation of the United States flag, in violation of then New Hampshire RSA 573:4 (1955). This statute has since been repealed by New Hampshire Session Laws Ch. 532 §26 (1973). The statute provided at the time of Royal's arrest:

> "573:4 Mutilation, etc. No person shall publicly mutilate, trample upon, defile, deface or cast contempt upon, either by words or acts, any of said flags, standards, colors or ensigns, whether the same are public or private property."

At the time of his arrest, Respondent Royal was wearing an Army fatigue jacket, on the right sleeve of which was attached a flag of the United States, in an upside down position. Under the flag was a hole. Another patch was sewn partially over the flag. After being informed of his rights,

Respondent Royal stated that he had sewn the flag on his jacket as a patch. He further stated that he did this because he thought it was "cool".

Royal was found guilty by the Portsmouth, New Hampshire District Court and appealed for a trial de novo to the Rockingham County Superior Court, where he was again found guilty. His conviction was affirmed by the New Hampshire Supreme Court which construed the language "or cast contempt . . . by acts . . . " in New Hampshire RSA 573:4 (1955) as limited to "physical abuse type of acts similar to those previously enumerated in the statute." State vs. Royal, 113 N.H. 224, 227, 305 A.2d 676, 679 (1973). Royal's application for a writ of habeas corpus was denied by the United States District Court for the District of New Hampshire.

The judgment of the District Court was vacated by the United States Court of Appeals

for the First Circuit on the ground that New Hampshire RSA 573:4 (1955) was "so vague as not to have provided Petitioner an intelligible standard against which to measure his guilt or innocence." Appendix A, page 5. In holding that the statute in question was void for vagueness, the First Circuit refused to consider the New Hampshire Supreme Court's narrowing construction of the act, stating instead that "fairness requires evaluation of the law as is [sic] existed at the time of Royal's arrest and conviction." Appendix A, page 8.

REASON FOR GRANTING THE WRIT

THE REFUSAL OF THE FIRST CIRCUIT TO CONSIDER RSA 573:4 (1955) AS CONSTRUED BY THE NEW HAMPSHIRE SUPREME COURT AND NOT MERELY AS WRITTEN, BEFORE CONSIDERING WHETHER THE STATUTE IS VOID FOR VAGUENESS, CONFLICTS WITH AN UNBROKEN LINE OF DECISIONS OF THIS COURT AND CONTRAVENES THE BASIC PRINCIPLES OF FEDERALISM.

The doctrine of unconstitutional uncertainty - the "void for vagueness" doctrine - has frequently been applied by federal courts to strike down state laws. See generally, Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). The rationale for the doctrine has been variously stated, but perhaps most familiar is the idea that statutes must state their demands in terms which are not so vague that "men of common intelligence must necessarily guess at their meaning." Conally vs. General Construction Co., 269 U.S. 385, 391 (1926). However, in some instances, this Court has

indicated that statutes may constitutionally require a certain degree of guesswork. Nash vs. United States, 229 U.S. 373, 377 (1913). Moreover, it has long been recognized that "practically, in its application to actual affairs, for most of the laity, the law . . . is all ex post facto." J. C. Gray, The Nature and Sources of Law, 100 (1921). Indeed, this Court has recognized explicitly that "it is not likely that a criminal will carefully consider the text of the law before he murders or steals . . . ." McBoyle vs. United States, 283 U.S. 25, 27 (1931).

Perhaps because of these considerations this Court has consistently held that in determining whether a state statute is void for vagueness, federal courts must consider the statute as construed by the state courts in any prior litigation of the case at bar. See, e.g., Poulos vs. New Hampshire, 345 U.S. 395, 402-403 (1953). In Winters vs. New York, 333 U.S. 507, 514-515 (1948), Mr.

Justice Reed, speaking for the court, attempted to integrate the "fair warning" rationale of the vagueness doctrine with the rule that the statute must be considered as construed by state courts during the course of any prior litigation, stating that "the defendant, at the time he acted, was chargeable with the scope of subsequent interpretation." This concept, of course, is consistent with the idea expressed in McBoyle vs. United States, supra, that criminals do not carefully consider the text of penal statutes before they act. But perhaps the most trenchant explanation of the doctrine that federal courts must consider state statutes as construed by state courts, even if the state court construction occurred after the event in question, was made by Mr. Justice Brennan, in the course of his dissenting opinion in McGautha vs. California, 402 U.S. 183, 258 (1971):

> "To begin with, we have never treated claims of unconstitutional statutory vaguness in terms of the statute as written or construed prior to the time of the conduct in question. Instead we have invariably dealt with the statute as glossed by the court below at the time of the decision here . . . If the vagueness doctrine were fundamentally premised upon a concept of fair notice, such treatment would make no sense: a citizen cannot be expected to foresee subsequent construction of a statute by this or any other court. See Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 540-542 (1951). But if, as I believe, the doctrine of vagueness is premised upon the fundamental notion that due process requires governments to make explicit their choices against competing social policies . . . the inconsistency between theory and practice disappears."

Whatever the explanation for the rule enunciated in Winters, the vitality of the rule cannot be doubted. Winters was cited with approval in Mullaney vs. Wilbur, 421 U.S. 684, 691 (1975), Wainwright vs. Stone, 414 U.S. 21, 23 (1973), and Papachriston vs. Jacksonville, 405 U.S. 156, 165 (1972). Earlier cases

such as Giaccio vs. Pennsylvania, 382 U.S. 399, 404 (1966), and Shuttesworth vs. Birmingham, 382 U.S. 87, 91 (1965), as well as the cases decided before Winters such as Chaplinsky vs. New Hampshire, 315 U.S. 568, 572, 573 (1942), Cox vs. New Hampshire, 312 U.S. 569, 575-576 (1941), and Stromberg vs. California, 283 U.S. 359, 364-365 (1931), support cogently Mr. Justice Brennan's statement that this Court has invariably dealt with the statute as construed by the court below, even if that construction occurred after the act in question. McGautha vs. California, supra, at 258.

In holding that New Hampshire RSA 573:4 (1955) must be applied to Respondent Royal as it was written at the time of Royal's act and not as construed by the New Hampshire Supreme Court, the First Circuit purported to rely upon Ashton vs. Kentucky, 384 U.S. 195 (1966), a case which held only that the due process clause of the Fourteenth

Amendment prohibited prosecution for the common law offense of criminal libel. In light of the unbroken line of decisions of this Court holding otherwise, it is apparent that the judgment of the First Circuit in the instant case is clearly in conflict with the decisions of this Court.

Perhaps even more important than the erroneous nature of the decision, however, is the destructive effect that the holding of the First Circuit has on the basic principles of federalism. Since Pollard vs. Dwight, 8 U.S. (4 Cranch) 421, 429 (1808), it has been settled that the construction given a state statute by the highest court of a state is to be regarded as part of the statute, and is as binding upon federal courts as the text of the statute itself. The unwarranted expansion of the vagueness doctrine by the First Circuit has created a new and powerful weapon which can be used

to improperly strike down state statutes and policies without permitting state courts to first determine the propriety and lawfulness of such statutes. McGautha vs. California, supra, at 258. If the First Circuit's novel approach to the vagueness doctrine is not repudiated by this Court, the foreseeable result could well be extraordinary and unprecedented federal intrusion into state affairs.

CONCLUSION

It is respectfully submitted that the constitutional question is substantial and that this Court should note probable jurisdiction and set the case for oral argument.

Respectfully submitted,

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May 20, 1976

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 75-1260

WALTER C. ROYAL
PETITIONER, APPELLANT,
v.
SUPERIOR COURT OF NEW HAMPSHIRE,
ROCKINGHAM COUNTY,
RESPONDENT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
(HON. HUGH H. BOWNES, *U.S. District Judge*)
(397 F. Supp. 260)

Before
ALDRICH, McENTEE and CAMPBELL,
Circuit Judges.

Richard S. Kohn, with whom *Anthony McManus* and *McManus and Johnson* were on brief, for appellant.
Edward N. Damon, Attorney, with whom *Warren B. Rudman*, Attorney General, and *Robert V. Johnson, II*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellee.

March 12, 1976

CAMPBELL, *Circuit Judge*. Walter C. Royal was arrested nearly six years ago while wearing upside down upon his sleeve a small American flag that was partly covered by another patch. He was convicted under New Hampshire's then flag desecration statute, N.H. Rev. Stats. Ann. ch. 573:4 (1955).[1] These events took place at a time when the flag

[1] The statute provided:
"573:4 Mutilation, etc. No person shall publicly mutilate, trample upon, defile, deface, or cast contempt upon, either by words or acts, any of said

was " 'an object of youth fashion and high camp' ", *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974), widely associated with the nation's policies in Indochina, *see Spence* v. *Washington*, 418 U.S. 405, 410 (1974). Since then the very broad state statute under which petitioner was convicted has been repealed, N.H. Rev. Stats. Ann. ch. 646:1 (Supp. 1975);[2] contempt language equivalent to that on which the conviction was partially based has been held unconstitutionally vague, *Goguen, supra*;[3] and new standards for examining flag legislation against first amendment claims have emerged, *Spence, supra; see Cline* v *Rockingham County Superior Court*, 502 F.2d 789 (1st Cir. 1974).

The rather meager facts before us pertaining to Royal's offense appear in a stipulation in the district court, as follows:[4]

flags [of the United States or of any state or evidently purporting to be such] ... whether the same are public or private property."
N.H. Rev. Stats. Ann. ch. 573:4 (1955). The maximum penalty was set at thirty days' imprisonment plus a fifty dollar fine. *Id* ch. 573:5.

[2] Chapter 573:4 was repealed as part of a general revision of the flag-protection provisions in November, 1973. The flag desecration provision now reads:
"A person is guilty of a misdemeanor if he
...
IV. purposely or knowingly mutilates or defiles any such flag [of the United States or of any state] ...."
N.H. Rev. Stats. Ann. ch. 646:1 (Supp. 1975).

[3] The Massachusetts statute considered in *Goguen* provided in relevant part:
"Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States..., whether such flag is public or private property..., shall be punished by a fine of not less than ten nor more than one hundred dollars or by imprisonment for not more than one year, or both."
Mass. Gen. Laws Ann., ch. 264, § 5, *quoted in Smith* v. *Goguen*, 415 U.S. 566, 569 n.3 (1974).
We see no constitutionally significant difference between the "treats contemptuously" language of the Massachusetts statute and the "cast contempt" language of chapter 573:4.

[4] Neither the state trial transcript nor petitioner's jacket, which was the state's Exhibit 1, is included in the record. From the state courts we have a document summarizing the state trial proceedings, Reserved Case, *State* v. *Royal* (Rockingham County Superior Court, 1971), and the New Hampshire Supreme Court's published opinion, *State* v. *Royal*, 305 A.2d 676 (N.H. 1973).

"1. On October 8, 1970, at approximately twelve o'clock midnight, Walter C. Royal was a passenger in a motor vehicle operated in Portsmouth, New Hampshire, the motor vehicle having been stopped by Police Officer Paul S. Herrmann of the Portsmouth Police Department for a possible motor vehicle violation. Mr. Royal got out of the motor vehicle. Officer Herrmann observed Mr. Royal to be wearing an Army fatigue jacket, on the right sleeve of which was attached a flag of the United States of America. Under the flag was a hole in the jacket. The flag was attached to the jacket in an upside down position. Another patch was sewn partially over the flag.

2. On the date of his arrest, Mr. Royal, having been informed of his rights stated that he had sewn the flag on the sleeve of his jacket as a patch. Mr. Royal further stated that he did this because he 'thought it was cool'.

3. The flag sewn on Mr. Royal's jacket contained 49 stars and 13 stripes."

(citations omitted) By a Portsmouth District Court complaint petitioner was charged with "Mutilation of the United States flag" in violation of chapter 573:4.[5] The complaint alleged that he had worn

> "on the right sleeve of his outergarment the flag of the United States of America, said flag being used for the sole purpose as a patch to cover a hole in said outergarment, said flag being upside down and with another patch sewn partially over it."[6]

He was found guilty, first by the Portsmouth District Court and then, after a jury-waived trial de novo, by the Rocking-

[5] Reserved Case, *State* v. *Royal*, at 1 (Rockingham County Superior Court, 1971).

[6] *Id.* at 1-2; Stipulation of Facts, ¶ 4.

ham County Superior Court. The Superior Court declared, "It is found that the respondent publicly defiled, and he also publicly cast contempt upon, the flag of the United States of America. It is found that the defendant is guilty as charged."[7] Sentence was stayed pending appeal.

The New Hampshire Supreme Court overruled Royal's exceptions and confirmed the conviction. *State* v. *Royal*, 305 A.2d 676 (N.H. 1973).[8] Stating that Royal was charged with "the title of statute," the court considered "what prohibitions within the statute apply to defendant's proven conduct." *Id.* at 678. It then focused on the portion of chapter 573:4 that reads: "or cast contempt upon." On the assumption that words were not at issue,[9] the court treated that portion of the statute "for the purpose of this case ... as though it read 'or cast contempt upon, by acts, any of said flags ....'" *Id.* at 678. Recognizing that even this language as it stood "would face constitutional difficulty not only because of vagueness but also because of overbreadth in relation to the first amendment ...", *id.* at 679, the court construed it to prohibit only "physical abuse type of acts similar to those previously enumerated in the statute...." *Id.* The court added, "The specific acts prohibited or any similar acts upon the flag which ordinary men would know cast contempt upon it are within the orbit of the prohibition without regard to the purpose of the person committing the act." *Id.* Applying this construction

[7] Reserved Case, at 2.

[8] Royal's appeal was consolidated with that of one Morrissette, who, like the petitioner in *Smith* v. *Goguen*, 415 U.S. 566 (1974), was convicted for wearing the flag on the seat of her pants.

[9] The court stated:

> "No words are alleged and there is no evidence that either defendant spoke so that neither conviction could have in any part been based on the use of words. *Cf. Street* v. *New York* [394 U.S. 576 (1969)]."

305 A.2d at 678. The court apparently considered it immaterial that Royal had told the arresting officer that he thought wearing the flag as he did was "cool". Stipulation of Facts, ¶ 2.

to Royal, the court found the evidence sufficient to support the conviction:

> "Royal wore the flag as a patch over a hole in the sleeve of his jacket. Since another patch was sewn partially over the flag, the flag was thus mutilated and defaced contrary to the prohibitions of the statute."

Id. at 680.[10]

Following the appeal, Royal was sentenced to one week in prison and a fine of $150, with execution stayed pending his filing of this federal habeas corpus petition. The district court thereafter denied the petition, *Royal* v. *Superior Court,* 397 F. Supp. 260 (D.N.H. 1975), holding: (1) that Royal was not engaged in protected expression in treating the flag as he did; (2) that the statute was not vague as construed by the New Hampshire Supreme Court; and (3) that while the statute was overbroad on its face even as construed, Royal could not raise facial overbreadth as a defense, since the statute had been repealed and had no "potential for a substantial number of impermissible applications...." *Goguen* v. *Smith,* 471 F.2d 88, 98 (1st Cir. 1972), *aff'd on other grounds,* 415 U.S. 566 (1974).

While agreeing with much in the district court's opinion, we disagree that the New Hampshire Supreme Court's curative efforts after Royal's conviction were able to offset chapter 573:4's fatal vagueness as to him. Accordingly we reverse on the ground that Royal was denied due process of law, having been charged and convicted under a statute so vague as not to have provided, in advance, an intelligible standard against which to measure his guilt or innocence.

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[10] The court also found sufficient evidence to support Morrissette's conviction: "Morrissette was wearing a flag on the seat of her trousers. This was an act similar to those specifically prohibited which ordinary men would all agree casts contempt upon the flag. *State* v. *Kasnett,* 30 Ohio App. 2d 7, 283 N.E.2d 636 (1972)."

305 A.2d at 680-81; *cf. Smith* v. *Goguen,* 415 U.S. 566, 570 n.4 (1974).

It should be remarked that there was confusion throughout the state proceedings as to what statutory prohibition or prohibitions Royal was charged with and found guilty of violating. The complaint charged him with flag "mutilation". However, the Superior Court and the state Supreme Court apparently took "mutilation" to be a generic term that embraced both mutilation as such and all the other prohibited acts of trampling upon, defiling, defacing, and casting contempt upon the flag. The Supreme Court explained this approach by calling "mutilation" the "title of the statute," 305 A.2d at 678, although the actual heading of chapter 573:4 is "Mutilation, etc." Followed as the heading is by a text in which "mutilate" is but the first of five enumerated acts, it is hard to see how mutilation can be read to subsume all the other listed forms of flag desecration. *Cf. Joyce* v. *United States,* 454 F.2d 971, 976-77 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 969 (1972) (charge under federal desecration statute must connect specific acts with the conjunctive "and" before evidence can be admitted as to more than one act).

Be that as it may, the Superior Court, taking a general view of the charge, mentioned defilement and casting contempt, not mutilation, as the acts of which Royal was guilty.[11] The Supreme Court then upheld the conviction, saying, however, that the evidence showed mutilation and defacement. This shift of grounds on appeal is difficult to explain. Presumably the state Supreme Court did not intend to put the conviction on a new factual basis without regard for the trial court's findings,[12] but rather viewed mutilation

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[11] We interpret the trial court's finding that Royal was "guilty as charged" to be a conclusion, drawn from the specific findings of defiling and casting contempt, that Royal was guilty of violating chapter 573:4. There is no indication that the trial court found the specific act of mutilation; its only reference was to the two other of the statute's prohibitions.

[12] *Cf. State* v. *Inselburg,* 330 A.2d 457 (N.H. 1974).

> "In reviewing on appeal a trial court's determination, the question

and defacement as forms of casting contempt, as it interpreted that term in its opinion, and meant to uphold the conviction on that theory.[13] In any case the shifting theories underlying the charge, the conviction, and the decision on appeal, leave considerable doubt as to the precise nature of Royal's offense and of the proof and legal arguments that might have been able to establish innocence.

If we add to the foregoing uncertainties the plain and acknowledged infirmity of the statute as written, we find it hard to say that Royal was charged and convicted under a statute providing a reasonably ascertainable standard of guilt. The "cast contempt" language of chapter 573:4 was, as all now concede, unconstitutionally vague, and, at the time of Royal's trial and conviction that language was as yet devoid of any narrowing state court construction. "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Goguen*, supra, at 575. And the language was vague not just generally but as applied to Royal:

> "To be sure, there are statutes that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain. The hard-core violator concept

presented is whether there is evidence in the record from which a reasonable person could reach the conclusion which the trial court did."
Id. at 461. *See also Hoffman* v. *United States*, 445 F.2d 226, 229 n.10 (D.C. Cir. 1971).

[13] The following passage supports this view:
"The words cast contempt are directed to the effect of the prohibited acts and not at the intention of the actor.... *The specific acts prohibited* or any similar acts upon the flag which ordinary men would know cast contempt upon it *are within the orbit of the prohibition* without regard to the purpose of the person committing the act. Our statute therefore avoids the difficulties found in the unconstructed Massachusetts statute which punished one who 'treats contemptuously' the flag. *Goguen* v. *Smith* [471 F.2d 88, 104 (1st Cir. 1973), *aff'd*, 415 U.S. 566 (1974)].
305 A.2d at 679.

> makes some sense with regard to such statutes. The present statute, however, is not in that category. This criminal provision is 'vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather that no standard of conduct is specified at all.' *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). Such a provision simply has *no* core...."

Id. at 577-78.

We are urged by appellee to focus on the New Hampshire Supreme Court's later construction of the casting contempt provision in determining whether that provision gave adequate guidance to satisfy due process.[14] But even if as construed chapter 573:4 became "a precise, narrowly drawn statute prohibiting specific behavior," *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965), fairness requires evaluation of the law as is existed at the time of Royal's arrest and conviction. As the quoted language from *Goguen* indicates, Royal cannot be dismissed as a "hard core" violator whose conduct, without question, was prohibited by the cast contempt provision of the statute. The *Goguen* opinion made clear that such a provision specifies no standard of conduct and has no hard core. *Goguen, supra,* at 577-78. Thus at the time of his conviction, Royal could legitimately complain not only of the statute's potential for "chilling" or infringing the rights of others, but also of the unfairness of applying it to him. And while the danger to others might be cured by a narrowing construction on appeal,[15] the un-

[14] The New Hampshire Supreme Court's construction is, of course, binding upon us. *Pollard* v. *Dwight*, 8 U.S. (4 Cranch) 421, 429 (1808). But the question here is not what the statute means or says, but whether the court's construction can be applied retrospectively to Royal consistently with due process. *See Bouie* v. *City of Columbia*, 378 U.S. 347 (1964).

[15] The danger of vagueness on the face of a statute is more obviously cured when, as here, the offending language is removed by legislative repeal. *See* note 2 *supra*. However, while a repeal eliminates the danger of future selective law enforcement, it may also underscore the selectivity of such

fairness of Royal's standardless arrest, prosecution and trial could not.

> "[W]here an accused is tried and convicted under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained on appeal by a limiting construction which eliminates the unconstitutional features of the Act, as the trial took place under the unconstitutional construction of the Act."

Ashton v. *Kentucky*, 384 U.S. 195, 198 (1966).[16] Whatever the merits of the New Hampshire Supreme Court's construction, therefore, it could not validate retroactively the casting contempt ground of Royal's conviction.

Nor can the trial court's finding that Royal also "publicly defiled" the flag be viewed as a "distinct alternative basis" on which the conviction can be sustained. *Coonan* v. *Commanding Officers*, 343 F. Supp. 1281, 1282 (E.D. Wis. 1972); *see Street* v. *New York* 394 U.S. 576 (1969). Royal was not charged specifically with defilement and his conviction was not upheld by the New Hampshire Supreme Court on that basis. Although the Supreme Court found sufficient evidence of mutilation and defacement it made no mention of defilement notwithstanding the Superior Court's finding. Without any explanation by either New Hampshire court of how petitioner's conduct defiled the

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enforcement as has occured. Here we observe that there have been only two reported convictions in the period from 1899 to 1973. We note also that the wearing of a small flag emblem on a sleeve even upside down and partially covered by another patch, is hardly conduct so patently illegal as to require no definition at all.

[16] *See Smith* v. *Goguen*, 415 U.S. 566, 580 (1974) (recognizing "the problems presented by an appellate court's limiting construction in the very case in which a defendant has been tried under a previously unnarrowed statute..."); *cf. Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). *But see Winters* v. *New York*, 333 U.S. 507, 514-15 (1948); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942); *Cox* v. *New Hampshire*, 312 U.S. 569(1941). *See generally* Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 540-41 (1951); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67, 73-74 (1960).

flag,[17] we are unable to say that the defiling ground was sufficiently definite and independent to support the conviction alone.

Vacated and remanded with directions to grant the writ.

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[17] We cannot tell, for example, whether the patch that "partially covered" the flag was neatly sewn along one border of the flag, or whether it was itself a symbol of some sort, as in *Spence* v. *Washington*, 418 U.S. 405 (1974), and *Cline* v. *Rockingham County Superior Court*, 502 F.2d 789 (1974).

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APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Walter C. Royal	)	
	)	
v.	)	Civil Action No. 74-12
	)	
Superior Court of New Hampshire, Rockingham County	)	

MEMORANDUM OPINION

This is a petition for a writ of habeas corpus.

On October 8, 1970, at approximately 12:00 Midnight, the car in which petitioner was a passenger was stopped for speeding by a radar unit of the Portsmouth, New Hampshire, Police Department. When petitioner alighted from the vehicle, a police officer noticed that he had a small American flag patch sewn onto the sleeve of his jacket which was partially covered by another patch. At that point, petitioner was placed under arrest and taken to the Portsmouth Police Station. While at the Police Station and after being given his Miranda warnings, petitioner told the police that he had sewn the flag onto his jacket sleeve in order to be "cool."

On October 9, 1970, petitioner was charged with violating NH RSA 573:4 in that he did:[1]

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1. NH RSA 573:4 provides:

> No person shall publicly mutilate, trample upon, defile, deface, or cast contempt upon, either by words or acts, any of said flags, standards, colors, or ensigns, whether the same are public or private property.

On November 1, 1973, New Hampshire amended the flag desecration statute to now read as follows:

> A person is guilty of a misdemeanor if he
>
> I. purposely places any unauthorized inscription or other thing upon any flag of the United States or of any state of the United States; or
>
> II. knowingly exhibits any such flag knowing the inscription or other thing to be unauthorized; or
>
> III. for purposes of advertising a product or service for sale or free distribution, affixes a representation of the flag of the United States or of a state of the United States to such product or on any display whereon such product or service is advertised; or
>
> IV. purposely or knowingly mutilates or defiles any such flag; or
>
> V. having been presented with a flag in behalf of this state and using such flag in violation of this section, refuses to comply with a request by the governor that such flag be returned. NH RSA 646:1 (Supp. 1975).

> wear on the right sleeve of his outergarment the flag of the United States of America, said flag being used for the sole purpose as a patch to cover a hole in said outergarment, said flag being upside down and with another patch sewn partially over it.

On October 13, 1970, after pleading "not guilty," petitioner was convicted of violating NH RSA 573:4 in Portsmouth District Court and sentenced to four months of incarceration and ordered to pay a fine of $300. The sentence was stayed upon his appeal to Rockingham County Superior Court for a trial de novo.

Petitioner argued before the Superior Court that the complaint should be dismissed because NH RSA 573:4 was unconstitutional on its face and as applied to him. On June 16, 1971, petitioner was found guilty by the Superior Court and imposition of sentence was stayed pending appeal to the New Hampshire Supreme Court.

Once again, petitioner argued that the complaint should be dismissed "on the grounds of unconstitutionality of the statute due to vagueness, or as a violation of the first amendment either on its face or only as applied to him." State v. Royal, 113 N.H. 224, 225 (1973). The New Hampshire Supreme Court rejected all of petitioner's contentions and upheld his conviction. Id. at 230.[2]

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2. The Royal Court recognized that the statutory ban on words which were contemptuous of the flag was of "doubtful constitutionality" and interpreted the statute to prohibit only that conduct which is physically abusive to the flag. Id. at 226-227.

On December 12, 1973, petitioner was sentenced to serve one week in the House of Corrections at Brentwood, New Hampshire, and to pay a fine of $150. Petitioner then filed a motion for stay of execution in this court while he sought relief through a petition for a writ of habeas corpus. The stay was granted and, on January 11, 1974, a petition for a writ of habeas corpus was filed with this court.

THE LAW

Litigation concerning the constitutionality of flag use and flag desecration statutes is approaching epedemic proportions. See Smith v. Goguen, 415 U.S. 566 (1974) (White, J., concurring at 583-584 n.1). The flag has become "an object of youth fashion and high camp . . . ." Id. at 574. In addition, the flag has become the symbol towards which national, political and social frustration and anger has been directed. Goguen, supra; Spence v. Washington, 418 U.S. 405 (1974); Street v. New York, 394 U.S. 576 (1969).

In two recent opinions, Goguen, supra, and Spence, supra, the Court attempted to delineate the constitutional limits on the state's power to criminally regulate "flag etiquette." Despite the Court's attempt to reduce the constitutional tension created by the First Amendment coming into conflict with the state's desire to protect the "pristine purity" of the flag, stare decisis does not provide a determinative answer to the issues raised. Instead, each statute and factual background must be examined independently to determine whether the state has transgressed the constitutional boundaries erected by the First Amendment.

The petitioner challenges the constitutionality of his conviction on three separate grounds. First, that, under these facts, his conduct is immunized from criminal prosecution by the First Amendment to the United States Constitution. Second, that the statute is unconstitutionally vague; and third, that, as construed by the New Hampshire Supreme Court, the statute is void for overbreadth.

The first step of analysis is to determine whether petitioner's conduct is "so intertwined with expression" that First Amendment considerations come to the fore. Spence, supra, 418 U.S. at 410; Cowgill v. California, 396 U.S. 371 (1970) (Harlan, J., concurring).

At first blush, it would appear that the "communicative connotations" of the flag enshrouds all conduct which makes use of the flag with First Amendment protection. Goguen v. Smith, 471 F.2d 88, 99-100 (1st Cir. 1972). But the presence of the flag does not, by itself, trigger the First Amendment. Instead, it is "necessary to determine whether [petitioner's] activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, ..." Spence, supra, 418 U.S. at 409. The question, therefore, is not whether petitioner was prosecuted for desecrating the flag, but whether he was prosecuted "for the expression of an idea through activity." Id. at 411. The First Amendment prohibits only the latter.

In order to determine whether activity is "protected expression," the court must inquire into the nature of petitioner's activity "combined with the factual context and environment in which it was undertaken, ..." Id. at 410.

Although the record before me is scanty, there is no evidence that petitioner was intending to convey a "particularized message" when he used the American flag as a sleeve patch, with another patch partially sewn over it. Nor is there any evidence from which it can reasonably be inferred that petitioner intended to publicly convey any message or idea at all.

Petitioner stated that he used the flag as a sleeve patch because he thought it was a "cool" thing to do. While the word "cool" may be a term of art for a certain group, its meaning, if any, is at best unclear. For some people, "cool" may convey being an "in" person; to others, it approaches the "mindless nihilism" proscribed by Spence. Id. at 410. In any event, the desire to be "cool" does not have a talismanic effect which gives First Amendment protection to conduct which is not otherwise protected.

The distinction between Spence and the case at bar is clear. Spence had superimposed the peace symbol on the flag in order "to associate the American flag with peace instead of war and violence . . . . [I]t was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." Spence, supra, 418 U.S. at 408 and 410-411; see also Cline v. Rockingham County Superior Court, 502 F.2d 789, 791 (1st Cir. 1974).

Unlike Spence and Cline, petitioner did not display the flag in order to protest any facet of national policy. Moreover, petitioner's message was ambiguous at best. While

the medium may be the message, there must be some message in order for the First Amendment to become operative. It is worth noting that, if petitioner was intending to convey a message by wearing the flag as a patch on his sleeve, he did his best to minimize the effectiveness of its display by sewing another patch partially over the flag.

Although I believe that "in the nebulous realm of symbolic speech," Goguen, supra, 471 F.2d at 104, courts should be most sensitive to the myriad forms of symbolic expression, the facts of this case lead only to the conclusion that petitioner wore the American flag on his sleeve for the sole purpose of patching a hole in it.

I do not believe that any and all flag defilement or mutilation constitutes speech. As the Court stated in United States v. O'Brien, 391 U.S. 367, 376 (1968), and reiterated in Spence, supra, 418 U.S. at 409: "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

As an adjunct, I add that an apparently limitless variety of flag conduct cannot be deemed "protected expression" simply because the actor makes use of the American flag. It is essential that petitioner establish that he was attempting to convey some idea or message through his conduct.

Petitioner was prosecuted not for the expression of an idea, but because he defiled the American flag by using it as a sleeve patch and sewing over it another patch. To enshroud petitioner's activity with First Amendment protection is to blithely declare that, in the absnece of a possibility that

the actor's conduct will cause a breach of the peace, all state flag desecration statutes are unconstitutional. I do not believe that the First Amendment or the cases mandate this result. I find that by using the American flag as a patch petitioner was not engaged in protected expression and that he was subject to the criminal provisions of NH RSA 573:4.

I next consider petitioner's vagueness challenge.

This case is unlike Goguen, supra, 415 U.S., for here, there is a limiting State Supreme Court decision. See id. (White, J., concurring at 588-589 n.3). The New Hampshire Supreme Court has interpreted the statute so that it only proscribes conduct which affects the physical integrity of the flag and which "ordinary men would know cast contempt upon it. . . ." Royal, supra, 113 N.H. at 228. See also Goguen, supra, 415 U.S. at 582-583 n.31. In addition, the statute as interpreted is an almost identical counterpart to the federal flag desecration statute which has been held to satisfy constitutional standards with regard to vagueness. 18 U.S.C. § 700 (Supp. 1975); Joyce v. United States, 454 F.2d 971 (D.C. Cir. 1971), cert. denied 405 U.S. 969 (1972); 90th Cong. 2d Sess., U. S. Code and Cong. Admn. News at 2509 (1968). The statute as interpreted "provides the requisite degree of certainty to provide men of ordinary intelligence with fair notice as to what conduct is proscribed." State v. Kool, 212 N.W.2d 518, 519 (Iowa 1973).

Finally, petitioner contends that, in the light of Spence, NH RSA 573:4, as interpreted by the New Hampshire Supreme Court, is void for overbreadth.

I agree with petitioner that the New Hampshire Supreme Court's decision in Royal cannot withstand constitutional attack in Spence's aftermath. Royal held that "[t]he commission of the same act upon the flag would not be treated differently depending upon the attitude of the actor, for the prohibited acts as we have said are proscribed without regard to the attitude of the person performing them." Id. at 230. This interpretation is in direct conflict with Spence. The ultimate holding in Spence was that there is certain flag-related conduct which receives First Amendment protection despite the fact that the actor's conduct affects the physical integrity of the flag. As I read the New Hampshire Supreme Court's decision in Royal, the State could prosecute any person whose conduct affects the physical integrity of the flag despite that person's intent to convey a "particularized message." This is not the law in light of Spence.

Petitioner's attack must fail, however, because the statute, under which he was convicted, has been repealed. See NH RSA 646:1 (Supp. 1975).

The First Circuit recognizing that the overbreadth argument is a "powerful weapon which, if improperly used, may contravene principles of federalism," Goguen, supra, 471 F.2d at 97, established judicial guidelines in suits of this nature. The court suggested that:

> In the context of a federal habeas corpus proceeding a state criminal statute should not be ruled unconstitutional on its face as overbroad unless

> (1) the area affected by it includes a large proportion of First Amendment activities, (2) it possesses the potential for a substantial number of impermissible applications, and (3) immediate and effective excision of the statute's impermissible applications is not foreseeable without continued interruptions of First Amendment freedoms. Id. at 98.

Since the statute has been repealed, I find that petitioner is unable to satisfy the second Goguen requirement. His overbreadth attack must fail.

For the foregoing reasons, petitioner's writ of habeas corpus is denied.

SO ORDERED.

/s/ Hugh H. Bownes
United States District Judge

June 5, 1975

APPENDIX C

Rockingham
No. 6323

Exeter District Court
No. 6382

STATE OF NEW HAMPSHIRE v. WALTER ROYAL

STATE OF NEW HAMPSHIRE v. MICHELLE MORRISSETTE

May 31, 1973

1. In prohibiting "publicly cast contempt . . . by acts" upon the United States flag, RSA 573:4 is directed against acts of mutilation and defilement of the flag itself.
2. The words "cast contempt" are directed at the effect of the prohibited acts and not at the intention of the actor.
3. Symbolic speech does not enjoy the protection accorded to pure speech.
4. The State may incidentally restrict freedom of speech to the extent necessary to regulate the nonspeech element of conduct so as to further

an important governmental interest unrelated to the suppression of free expression.
5. Protection of the flag is within the police power of the State.
6. RSA 573:4 furthers the State's interests in protecting the physical integrity of the flag, in promoting patriotism, and in preventing breaches of the peace.
7. The legislature's specification in RSA 573:4 of acts likely to cause a breach of the peace if done publicly against the flag was not unreasonable.
8. Under RSA 573:4, a person may express any ideas or convey any message, but he may not perform the acts proscribed by the statute.
9. A sewing of a United States flag to the seat of trousers and a sewing of a patch over a United States flag worn as a patch over a hole in a jacket sleeve constituted mutilations of the flag and were punishable as offenses under RSA 573:4.

Warren B. Rudman, attorney general, and *Robert V. Johnson II,* assistant attorney general (*Mr. Johnson* orally), for the State.

Anthony McManus, by brief and orally, for Walter Royal.

William H. M. Beckett for Michelle Morrissette filed no brief.

GRIMES, J. These two cases, which were consolidated on appeal, involve the constitutionality of RSA 573:4 which prohibits the mutilation of the flag.

Defendant Royal was found guilty by the superior court of the charge of "mutilation of the United States Flag" for wearing as a patch over a hole in the sleeve of his jacket the American flag sewn upside down with another patch sewn partially over it. He moved to dismiss for failure of the complaint to state clearly the nature of the charge. Upon denial of this motion, he moved to dismiss on the grounds of unconstitutionality of the statute due to vagueness, or as a violation of the first amendment either on its face or only as applied to him. All questions of law arising out of defendant's exceptions to the denial of these motions were reserved and transferred by *Keller,* C.J.

Defendant Morrissette, charged with "Mutilation of National Flag", was found guilty by the Exeter District Court for casting contempt upon the flag by "affixing said flag to the seat of her trousers". The questions of law raised by

her contentions that her conduct is protected by the first and fourteenth amendments and that RSA 573:4 is unconstitutional were transferred by *Gage*, J.

RSA 573:4 states: "Mutilation, etc. No person shall publicly mutilate, trample upon, defile, deface, or cast contempt upon, either by words or acts, any of said flags, standards, colors, or ensigns, whether the same are public or private property." " [A]ny of said flags" refers to the flag of the United States or any State or "any flag or ensign evidently purporting to be either of said flags . . . ." RSA 573:1. Clearly, the flags used by defendants came within the language of the statute.

The flag is the symbol of those rights which, because they are fundamental to our society, are secured from the tyranny of the majority by incorporation in the constitution and entrusted to the courts for their defense. They dishonor the flag most, therefore, who seek to deny those rights to others. Among those rights is the right of free speech which carries with it the right to dissent from and disagree with the very principle which guarantees that right, including the right to express opinions about the flag which are defiant or contemptuous so long as they are not such as to provoke an immediate breach of the peace. *See West Virginia St. Bd. of Educ. v. Barnette,* 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943); *Gooding v. Wilson,* 405 U.S. 518, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972).

Thus in *Street v. New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), the Supreme Court struck down a conviction because it could have been based on that part of a statute which prohibited defendant's use of words contemptuous of the flag. Under this ruling, that aspect of RSA 573:4 dealing with words, unless construed as applying only to "fighting words", is of doubtful constitutionality. *State v. Chaplinsky,* 91 N.H. 310, 321, 18 A.2d 754, 762 (1941), *aff'd sub nom. Chaplinsky v. New Hampshire,* 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942); *Gooding v. Wilson supra.* We need not concern ourselves with the construction of the "by words" part of the statute at this time, however, for whatever its constitutional status may be, it would not affect the validity of the remainder of the section. *Fernald v. Bassett,* 107 N.H. 282, 285, 220 A.2d 739, 742 (1966); *State v. Chaplinsky,* 91

N.H. at 312, 18 A.2d at 757 (1941). In each of our cases, the defendant is charged with the title of the statute, and therefore we must consider what prohibitions within the statute apply to defendant's proven conduct.

In each of the cases before us, the complaints allege specific acts as constituting violations of the statute. No words are alleged and there is no evidence that either defendant spoke so that neither conviction could have in any part been based on the use of words. *Cf. Street v. New York supra.*

In considering the statute for the purpose of this case, therefore, we shall treat it as though it read "or cast contempt upon, by acts, any of said flags . . . ."

If "or cast contempt . . . by . . . acts" (RSA 573:4) is intended to prohibit all acts showing contempt, the statute would face constitutional difficulty not only because of vagueness but also because of overbreadth in relation to the first amendment. It has been said that some statutes could be interpreted to prohibit any breach of flag etiquette, regardless of intent, or all gestures directed at the flag. *See Goguen v. Smith,* 471 F.2d 88 (1st Cir. 1972).

Our statute is more narrowly drawn than some flag statutes. It deals only with the flag itself or any "flag or ensign evidently purporting to be" the flag. *State v. Cline, post* at 245, decided this date. Also, as we construe it, our statute prohibits only acts of mutilation and defilement inflicted directly upon the flag itself and does not prohibit acts which are directed at the flag without touching it. The statute enumerates specific acts of flag desecration, namely "mutilate, trample upon, defile, deface", all of which involve physical acts upon the flag. The general term "cast contempt" follows these enumerated specific acts. We hold that the phrase "or cast contempt by . . . acts" as used in RSA 573:4 is limited to physical abuse type of acts similar to those previously enumerated in the statute. 2 Sutherland, Statutory Construction § 4909 (3d rev. ed. Horack 1943); *State v. Small,* 99 N.H. 349, 111 A.2d 201 (1955); *State v. N.H. Gas & Electric Co.,* 86 N.H. 16, 163 A. 724 (1932).

The words "cast contempt" are directed to the effect of the prohibited acts and not at the intention of the actor. Violations do not therefore depend upon the attitude or

politics of the actor, but all who do the same act are treated alike regardless of their attitude. *Cf. Hodsdon v. Buckson,* 310 F. Supp. 528 (D. Del. 1970). The specific acts prohibited or any similar acts upon the flag which ordinary men would know cast contempt upon it are within the orbit of the prohibition without regard to the purpose of the person committing the act. Our statute therefore avoids the difficulties found in the unconstrued Massachusetts statute which punished one who "treats contemptuously" the flag. *Goguen v. Smith,* 471 F.2d 88, 104 (1st Cir. 1972).

Under our statute thus construed, "one does not need to guess at what is prohibited", *State v. Chaplinsky,* 91 N.H. at 321, 18 A.2d at 762 (1941), nor does it leave "unfettered discretion" in the hands of the police. *Pappachristou v. City of Jacksonville,* 405 U.S. 156, 168, 31 L. Ed. 2d 110, 119, 92 S. Ct. 839, 846 (1972); *Grayned v. City of Rockford,* 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972); *Goguen v. Smith supra.* It therefore is not vague, nor for the reasons hereinafter stated is it overbroad with respect to first amendment rights. *Hoffman v. United States,* 445 F.2d 226 (D.C. Cir. 1971).

Although neither of these defendants claims to have been saying or attempting to say anything by his conduct, nevertheless some forms of flag desecration and casting contempt by acts may be forms of symbolic expressions. The United States Supreme Court has not yet defined what limitations may be placed upon symbolic speech, but it seems clear that it does not enjoy the same degree of protection as does pure speech. *Cox v. Louisiana,* 379 U.S. 536, 555, 13 L. Ed. 2d 471, 484, 85 S. Ct. 453, 464 (1965). *See also Street v. New York supra; Cowgill v. California,* 396 U.S. 371, 372, 24 L. Ed. 2d 590, 90 S. Ct. 613, 614 (1970) (Harlan, J., concurring). Because conduct such as the defendants' might be used by others as an attempt to speak symbolically, we will consider defendants' attack upon the constitutionality of the statute on its face. *Gooding v. Wilson supra; Goguen v. Smith supra.*

When speech and nonspeech elements are contained in the same conduct, it has been held that under certain circumstances the State may regulate the nonspeech element even though there is an incidental limitation on the speech element.

United States v. O'Brien, 391 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968). The O'Brien test for a proper governmental regulation is if it is within the constitutional power of government, if it furthers an important governmental interest which is unrelated to the suppression of free expression, and if the incidental restriction on first amendment freedom is no greater than necessary. We think our statute meets this test. Clearly, protection of the flag falls within the police power of the State and defendants do not seriously contend otherwise. *State v. Cline supra.*

The State has an interest in protecting the physical integrity of the flag *(State v. Cline supra),* in promoting patriotism and love of and pride in country (*Halter v. Nebraska,* 205 U.S. 34, 51 L. Ed. 696, 27 S. Ct. 419 (1907); *State v. Hoskin,* 112 N.H. 332, 295 A.2d 454 (1972) and in preventing breaches of the peace (*Halter v. Nebraska supra; Chaplinsky v. New Hampshire supra; Gooding v. Wilson supra).* Our statute furthers all three of these state interests. In view of what has been said in *Cline* and here, we need not dwell on the first two interests.

As to preventing breaches of the peace, we are dealing here with acts rather than words as in *Chaplinsky* and in *Cohen v. California,* 403 U.S. 15, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971). Some of the acts prohibited in public are specifically defined, *i.e.* mutilation, trampling, defiling and defacing. The others which reasonable men would agree cast contempt upon the flag must be of a similar nature. The legislature therefore was able to forecast in advance the type of acts that would fall within the scope of the prohibition and make a determination that such acts if done in public would be likely to cause a breach of the peace. We cannot say that this determination was unreasonable. As was said in *Halter v. Nebraska,* 205 U.S. at 41, 51 L. Ed. at 701, 27 S. Ct. at 421 (1907): "Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot." We cannot say that it was unreasonable for the legislature to assume that this feeling about our flag is so prevalent that the commission of the prohibited acts anywhere, anytime in public would create a danger to the public peace.

All three of these state interests are unrelated to the suppression of free expression. The statute as we have construed it is directed at acts upon the flag and not "at the expression of and mere belief in particular ideas". *Goguen v. Smith,* 471 F.2d at 102 (1973). The commission of the same act upon the flag would not be treated differently depending upon the attitude of the actor, for the prohibited acts as we have said are proscribed without regard to the attitude of the person performing them.

The statute also meets the last *O'Brien* test in that any incidental restriction on first amendment freedom is no greater than is essential to the furtherance of the state interests. The statute as we have said does not focus upon any particular attitude or belief. Rather, it is the act committed in public that furnishes the basis for the offense. Persons are free under this statute to express any ideas or convey any message they wish. They are prohibited only from performing the particular acts proscribed by the statute.

We hold that the complaints in each case clearly and fully inform the defendants what they are charged with and state an offense under RSA 573:4 which we hold to be constitutional.

The evidence is sufficient in each case to support the convictions. Royal wore the flag as a patch over a hole in the sleeve of his jacket. Since another patch was sewn partially over the flag, the flag was thus mutilated and defaced contrary to the prohibitions of the statute. Morrissette was wearing a flag on the seat of her trousers. This is an act similar to those specifically prohibited which ordinary men would all agree casts contempt upon the flag. *State v. Kasnett,* 30 Ohio App. 2d 77, 283 N.E.2d 636 (1972).

In each case, the order is

Exceptions overruled.

All concurred.